IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

COMPANY APPLICATION NO. 339 OF 2004
IN
COMPANY APPLICATION NO.338 OF 2004

In the matter of Section 391 (6) of the Companies Act, 1956;

And

In the matter of Scheme of compromise/arrangement between Sharp Industries Limited and its secured, unsecured creditors and equity shareholders.

WITH

COMPANY APPLICATION (LDG.) NO.827 OF 2004
IN
COMPANY APPLICATION NO.338 OF 2004

G.E. Capital Services India ....Applicant

V/s.

Sharp Industries Ltd. ....Respondent

WITH

COMPANY APPLICATION (LDG.) NO.462 OF 2004
IN
COMPANY APPLICATION NO.338 OF 2004

Converter Adhesiva & Chemicals Pvt.Ltd. ...Applicants

WITH

COMPANY APPLICATION (LDG.) NO.880 OF 2004
IN
COMPANY APPLICATION NO.338 OF 2004

Traxpro Enterprises Pvt.Ltd. ....Applicant

WITH

COMPANY APPLICATION (LDG.) NO.942 OF 2004
IN
COMPANY APPLICATION NO.338 OF 2004

Videocon International Ltd. ....Applicant

In the matter of Section 391 (6) of the Companies Act, 1956;

And

In the matter of Scheme of compromise/arrangement between Sharp Industries Limited and its secured, unsecured creditors and equity shareholders.

Sharp Industries Limited. ...Applicant

Mr.J.D. Dwarkadas with Jal Andhyarujina i/b Vijay Sharma for Applicant.

Mr.D.D. Madon, with B. Collabawala and K.B. Irani i/b Madekar and Co. for G.E. Capital services of India.

Mr.M.P. Rao i/b Bharat and Shah and Co. for Converter Adhesives and Chemicals Pvt. ltd.

Ms.J.M. Sidhwa with Ms.Hina Mehta, for Traxpro Enterprises P.Ltd.

Mr.R.D. Soni i./b. Ram and Co. for Videocon International Ltd.

CORAM : S.J. VAZIFDAR, J.
DATED : 4TH/5TH NOVEMBER, 2004.

ORAL JUDGMENT :

1. For convenience I will refer to the Applicant in Company Application no.339 of 2004 as the company and to the Applicants in the other Company Applications as the Applicants.

2. Company Application No.338 of 2004 was taken out by the Company, seeking directions for holding meetings of equity shareholders and secured creditors to consider and approve a scheme of compromise/arrangement proposed by it. In that company application, an order dated 27th August, 2004 in terms of the minutes of the order was passed directing the meetings to be held. Other usual directions regarding holding and convening of the

meetings were also passed. The company took out Company Application No.339 of 2004 in Company Application No.338 of 2004 seeking a stay of the hearing and final disposal of all the proceedings pending against the Applicant company, its directors, officers, civil/criminal in any Court or Tribunal in India or abroad and that the Plaintiff / Appellant / Complainant / Claimants in such proceedings be injuncted from carrying on with the said proceedings pending the outcome of the aforesaid meetings and in the event of the meetings approving the scheme of the compromise/arrangement, pending the hearing and final disposal of the proceedings for sanction of the said scheme.

3. By an order dated 27th August, 2004, an ad-interim order in terms of prayer (a) of Company Application No.339 of 2004 was granted for a period of twelve weeks i.e. upto 17.11.2004. Prayer (a) reads as under :-

> "(a). That pending the outcome of the various meetings of the Creditors of the Applicant Company and if the said meetings approve the scheme of compromise/arrangement by a statutory majority, pending the hearing and final disposal of the proceedings for sanction of the said

> Scheme, hearing and final disposal of all proceedings pending against the Applicant, its directors, officers, civil/criminal in any court or tribunal in India or abroad be stayed and the plaintiff / Appellant / Complainants / Claimants in such proceedings be injuncted from carrying on with the said proceedings."

4. The other Company Applications referred to above have been filed by various creditors for vacating the said order dated 27th August, 2004. There are several criminal and other proceedings taken out by the Applicants in these Company Applications as well as other creditors which are pending before different Courts. The recoveries sought in the civil proceedings go into several crores of rupees. The criminal complaints pertain to offences inter-alia under Section 138 of the Negotiable Instruments Act and Section 420 of The Indian Penal Code. It is not necessary to set out the amounts involved or the number of cases filed.

5. The Applicants had made ad-interim applications for vacating the stay granted by the order dated 27th August, 2004. At the hearing of these applications, it was agreed that the above Company Applications including Company Application

No.339 of 2004 should be disposed of finally. It is in these circumstances that all the above Company Applications were placed on board and taken up for hearing.

6. Section 391 (6) of the Companies Act, 1956 which falls for consideration reads as under :-

> . **391. Power to compromise or make arrangements with creditors and members:**
>
> "(6) The Tribunal may, at any time after an application has been made to it under this section, stay the commencement or continuation of any suit or proceeding against the company on such terms as the Tribunal thinks fit, until the application is finally disposed of."

7. The learned Counsel appearing on behalf of the Applicants submitted that :-

I). Section 391 (6) does not apply to criminal proceedings.

II). Protection under Section 391 (6) can be offered only to a company and not to sureties who have guaranteed the repayment of the dues of the company.

III). Notices of the hearing of the application for stay in Company Application No.339 of 2004 ought to have been given by the company to the Applicants under Rule 71 of the Company Court Rules.

IV). The proposed scheme under Section 391 is not maintainable in view of the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985 and in particular Sections 18, 26 and 32 thereof.

V). In the facts and circumstances of the case, the Company is not entitled to an order under Section 391 (6).

RE : SUBMISSION I.

8. Mr. Madon submitted that the ambit of the term "proceeding" in Section 391 (6) of the Companies Act, 1956 does not include within its scope criminal proceedings against the Company and its directors. The submission is well founded.

9. Mr. Madon relied upon the judgment of a

learned Single Judge of this Court in *State of Tamil Nadu v/s. Uma Investments Pvt. Ltd. (1977) 47 CC 242.* In that case the Applicant, the State of Tamil Nadu, took out a Judges Summons for vacating the ex-parte order obtained by the Company under section 391(6) in an application filed by it under Section 391 for sanction of a scheme of compromise with certain classes of creditors. The company had propounded the scheme in view of the financial difficulties faced by it for a variety of reasons which are not relevant for the present purpose. An ex-parte order was passed under Section 391(6) staying the commencement or continuance of all civil and criminal proceedings against the Company and its officers pending the hearing and final disposal of the Company Application for sanctioning the scheme of compromise and arrangement. Upholding the submission that the word "proceeding" in Section 391(6) does not cover criminal proceedings against the Company and its officers, it was held at page 245 as under :-

> . "The language of this sub-section is clear and unambiguous. The main controversy is focussed on the word "proceedings". According to Mr. Kambhatta, the word "proceedings" cannot cover criminal proceedings against the company and its officers. It could not have been the intention of the legislature to

> stay the commencement or continuation of criminal proceedings. The company and its officers must face the consequences of their illegal acts. There seems to be considerable force in these arguments. If the intention of the legislature had been to stay the commencement or continuation of criminal proceedings, it would have specifically said so. It is difficult to accept Mr. Mehta's line of interpretation indicated above that the word "proceedings" embraces criminal proceedings".

. The ratio is clear. The learned Judge has held in terms that the word "proceeding" in Section 391 (6) does not include in its ambit criminal proceedings.

10(a). Mr.Dwarkadas submitted that the judgment does not lay down that criminal proceedings which have the flavour of a claim for money would also be excluded from the scope of the expression "proceedings" under Section 391(6). Mr. Dwarkadas relied upon the following observation in the judgment which according to him made it clear that if criminal proceedings were adopted with a view to recover any pecuniary claim the Company Court can in exercise of power under section 391(6) stay the same :-

> . "The question then arises as to what meaning is to be given to

> the word "creditor". "Creditor" would be a person having a pecuniary claim against the Company, whether actual or contingent. If the claims of the creditors are of a pecuniary character or founded on money considerations, can it then be said that sub-section (6) of section 391 is intended to cover proceedings other than proceedings which involve pecuniary claims based on money considerations."

(b). Firstly these observations are only additional reasons furnished by the learned Judge for arriving at the conclusion that Section 391(6) does not include in its ambit criminal proceedings. These observations do not qualify the ratio contained in the first extract. This is clear from the very first sentence in the paragraph which contains the observation relied upon by Mr.Dwarkadas which reads : "There is another angle from which the provisions of section 391 can be looked at in order to find out whether it is within the scope and object of the section to cover criminal proceedings".

(c). It is true that in that case the scheme itself covered only the civil liabilities and not criminal proceedings against the Company and its officers. However, the stay was also sought in respect of criminal proceedings. The learned Judge therefore

considered the ambit of the term "proceeding". The learned Judge further held as under :

> . "It is impossible to take the view that Section 391 is meant for freezing criminal proceedings which may be instituted either by a creditor or a member of a company or by the State either against the company or its officers. If, the officers of the company are involved in offences like cheating, criminal breach of trust, misappropriation, forgery, using a forged document and falsification of accounts, in connection with the business of the company, can it be said that prosecutions can be stayed by the aid of sub-section (6) of section 391? Again, if the officers of the company were to be held responsible for contravention and infringement of the Income-tax Act or Foreign Exchange Control Act, can a company by putting a proposal before the court under section 391 seek the protection of the court under sub-section (6) of Section 391 and stay the pending proceedings or prevent the authorities under the Income-tax Act or the Enforcement Directorate from launching prosecutions ? Again, section 5 of the Companies Act, 1956, provides that for the purpose of any provision of this Act, an "officer who is in default" shall be liable to any punishment or penalty, whether by way of imprisonment, fine or otherwise. Can sub-section (6) of section 391 be made use of by a company (who is liable to be wound up) by coming forward with some sort of proposal ? In my opinion, criminal proceedings cannot be held over or avoided or criminal process evaded by resorting to a scheme of compromise or arrangement under section 391. Section 391 does not

> provide an umbrella to a company and its directors and officers for a thing which is an offence or an infringement and violation of any law, rule and regulation punishable by imprisonment or fine or both. Offenders cannot be given refuge in this section, nor can it be a shield for delinquent directors for theirs misdeeds. This is not the scheme of section 391 or the policy of law in the manner urged by Mr.Mehta". (emphasis supplied)

(d). If any doubt still remains it is put at rest by the following paragraph from the judgement :-

> . "Mr. Mehta argued that the pending and intended prosecutions under the Madras Chit Funds Act, 1961, are of a coercive character, inasmuch as the fair object of section 391 to equally distribute the assets of the company among the creditors would be defeated and the scheme would be affected. There is no merit in this argument. The scheme is put forth for compromise and not to save the company or its officers from facing prosecutions for offences committed in the course of the business of the company. The provisions of section 391(6) do not apply to criminal proceedings against a company. The proceedings referred to in this sub-section are meant to be of a civil nature. The character of the proceedings should be of pecuniary nature involving money considerations between the company and its creditors or members having a nexus or bearing with the proposal for compromise or arrangement, set afoot for consideration of the creditors or members as provided in sub-section (2) of section 391. The company and its officers or open to prosecution. Criminal proceedings can be commenced or continued

> notwithstanding the fact that a scheme for compromise or arrangement has been initiated under section 391. In my judgment, the provisions of sub-section (6) of section 391 are not meant to freeze the commencement or continuation of criminal proceedings against the company and its officers."

11. There is no scope for distinguishing the judgment as contended by Mr. Dwarkadas viz. that it does not apply to cases where the scheme provides for the termination of criminal proceedings against the Company and its officers and directors and civil proceedings against persons other than the Company itself.

12. In any event, the question whether proceedings under section 138 of the Negotiable Instruments Act are covered within the provisions of Section 391(6) is also not res-integra. In Criminal Appln.No. 2517 of 1998 - (1999) 1 Learned Judgements 288, it was contended that complaints under section 138 of the Negotiable Instruments Act are filed by parties with the principal object that the payee must get his money. In that case too, the complaint was filed by the Respondents against the Applicant for dishonour of the cheque. The Applicants in the judgment had prayed that the proceedings under section 138 ought to be

stayed till the disposal of the Application filed by the Applicants before the Calcutta High Court under section 391 of the Companies Act. The learned Judge first held that in proceedings under section 482 of the Criminal Procedure Code the question of invocation of inherent jurisdiction under section 391(6) did not arise at all. With this part of the judgment we are not concerned presently. However the learned judge in paragraph 4 considered the alternative case as well and held as under :

> "4. ....Secondly, even assuming that under Section 482 this Court could have considered that proceedings are pending before the Company Court in Calcutta when Scheme is under consideration could this Court stay the proceedings. The expression used is 'suit' or 'other proceedings'. A learned Single Judge of this Court in the State of Tamil Nadu v/s. Uma Industries Ltd. (supra) has held the provisions of section 391(6) will not apply in so far as the criminal proceedings are concerned. The said Judgment came up for consideration before me in Company Application no. 446 of 1997 in Company Application no. 457 of 1997 in Ion Exchange Finance Ltd. decided on 4th September, 1998 and some other matters. I had occasion to consider expression 'suit' or 'other legal proceedings'. In the context of Section 442 and 446 of the Companies Act, I have considered Chapter V wherein expression 'suit' or 'other legal proceedings' have been included including the expression 'legal proceedings' in Section 391(6). I have therein considered a Judgment of the learned Single Judge of the

> Gujarat High Court which has taken a different view than the view taken by this Court in the State of Tamil Nadu v/s. Uma Industries Ltd (supra). After considering the various Judgments. I have reiterated that the view taken by this Court in Uma Industries Ltd (supra) requires no reconsideration and is in confirmity with the provision of Chapter V of the Companies Act. The only limitation is that in a case where a fine is imposed on the Company, at the stage of the recovery of the fine, the Company Court can invoke its jurisdiction. The said matter had came up before me at the instance of Applicants against whom complaints had been filed under Section 138 of the Negotiable Instruments Act. I am therefore clearly of the opinion that the expression 'suit' and/or 'other legal proceedings' does not include criminal proceedings."

13. The above judgements are binding on me. Mr.Dwarkadas' submission is therefore rejected.

RE : SUBMISSION II.

14. Mr.Madon submitted that directors and guarantors of the Company are not entitled to the benefit of the provisions of section 391(6) of the Companies Act. This submission too is well founded.

15. As stated above there are various civil proceedings adopted by different creditors including

the Applicants before me against the company as well as its guarantors. The question is whether the guarantors are either themselves or on an application by the Company on their behalf, entitled to invoke the provisions of Section 391(6).

16(a). Mr.Madon relied upon the judgement of the Supreme court in *Punjab National Bank Ltd. v/s. Shri Vikram Cotton Mills and Another 1970 (1) S.C.C. 60*. Ranjit Singh & Sons Ltd. acted as the managing agent of the Respondents. The Petitioner had advanced certain facilities to the Respondents in respect whereof the usual documents were executed. Ranjit Singh, a director of Ranjit Singh & Sons Ltd., executed a deed which was construed by the Supreme Court in paragraph no.11 to constitute him a surety for the dues of the Respondent. Some of the creditors had filed a petition in the Allahabad High court for winding up. A scheme of composition was settled among the creditors of the Respondent. That scheme was sanctioned by the Allahabad High Court under section 391. The Petitioner filed a suit against the Respondent and Ranjit Singh to recover an amount of Rs.2,56,877/12/6/-. It was contended that Ranjit Singh was only a guarantor and not a co-debtor and that he therefore could be made liable only in the

case of default by the company and since the Company had made no default the suit against him was not maintainable. This contention was dealt with by the Supreme Court in paragraph No.13 which reads as under :-

> "13. ....We deem it necessary to observe that a binding obligation created under a composition under Section 391 of the Companies Act, 1956, between the Company and its creditors does not affect the liability of the surety unless the contract of suretyship otherwise provides. As observed in Halsbury's Laws of England, Vol.6 3rd Edn.,Article 1555 at p.771. "A scheme need not expressly reserve the rights of any creditors against sureties for debts of the company, as such rights are unaffected by a scheme." It was held in Re Garner's Motors Ltd that the scheme when sanctioned by the Court has a statutory operation and the scheme does not release other persons not parties to the scheme from their obligations." (emphasis supplied)

. The judgement is clear. It categorically holds that an obligation created under Section 391 under a composition between the company and its creditors does not affect the liability of the surety unless the contract of suretyship otherwise provides. Admittedly in the present case, the contract of suretyship does not provide otherwise. There is no scope for distinguishing this judgement in view of the

facts of this case as contended by Mr. Dwarkadas. The reliance upon the judgment by Mr. Madon is well founded.

17. It is pertinent to note further that the second part emphasized by me in the above extract also supports Mr. Madon's contention that the scheme under Section 391 does not release persons who are not parties to the scheme. The directors in the present case are not parties to the scheme which is only between the company and its Creditors.

18. The language of section 391(6) itself does not include within its scope any other party or person. The scheme propounded in the present case also is one between the Company and its creditors. The Officers, directors and guarantors of the company are not parties to the scheme. Indeed they could not be parties to the scheme.

19. Mr. Madon's submission is also supported by the judgment of a learned Single Judge of the Madras High Court in *B.K.M.S. Vanavarayar v. Somasundaram Mills (P) Ltd and Anr. (1976) 46 Com. Cas. 274* where the learned Judge has held :-

"As under Section 391 of the Companies Act, what was sanctioned by the High court would be binding on all the creditors including the decree-holder in this case. The decree-holder could not, after the sanction by the court of the scheme of compromise, pursue execution proceedings against the 1st defendant-company in the ordinary court of law. But, so far as the second judgment-debtor is concerned, he is certainly not a company entitled to invoke the benefit of section 391 or section 392 of the Companies Act. He is independently liable to pay the decretal amount because the decree granted against him is a joint and several decree. It was observed by the Supreme Court in *Punjab National Bank v. Shri Vikram Cotton Mills Ltd* as follows: "We deem it necessary to observe that a binding obligation created under a composition under section 391 of the Companies Act, 1956 between the company and its creditors does not affect the liability of the surety unless the contract of suretyship otherwise provides. As observed in *Halsbury's Laws of England,* volume 6, 3rd edition, article 1555, at page 771: 'A scheme need not expressly reserve the rights of any creditors against the sureties for debts of the company, as such rights are unaffected by a scheme.'

. It was held in *In re Garner's Motors Ltd.* that the scheme when sanctioned by the Court has a statutory operation and the scheme does not release other persons not parties to the scheme from their obligations." As the second judgment-debtor had entered into a contract of guarantee with the plaintiff, and a decree has been obtained by the plaintiff against him and the company jointly and

> severally, there is no legal embargo against the decree holder executing the decree against the second judgment debtor. The scheme, which was sanctioned by the company court, does not release the second judgment-debtor, who is a co-debtor of the company from his obligation under the decree to pay the decretal amount."

20. Mr. Dwarkadas relied upon various orders including those of this Court which granted a stay of all civil and criminal proceedings against the directors and guarantors of the Company. He relied upon an order dated 16th July, 2004 in Company Application No.231 of 2004, in Company Petition No.1017 of 2002, and an order dated 13th December, 2002 in Company Application (L) No.972 of 2002 in Company Application No.546 of 2002. However each of these orders is without reasons. The point that was argued before me was neither argued before nor considered by the learned Judges. Mr. Dwarkadas also relied upon the judgement of a learned Single Judge of the Gujarat High Court in *H.C. Raskapourt and others. v/s. Jaferbhai Mohmedbhai Chhatpar 1989 65 Com. Cas. 163.* It is true that this judgement supports Mr. Dwarkadas' contentions to the effect that the Court has power to stay criminal proceedings under Section 391(6) of the Companies Act. However that judgment expressly dissented from the judgement of this Court

in the case of *Uma Investments* (supra). The judgement of this Court is binding on me and therefore the judgment of the Gujarat High Court is of no assistance to Mr. Dwarkadas.

21. In the circumstances Mr. Madon's submission is upheld.

RE : SUBMISSION III

22. A grievance was made on behalf of the applicants that the Company applied for the order ex-parte and without notice to them. The grievance is justified. Rule 71 of the Companies Court Rules, 1959 reads as under :

> **"R.71.Application for stay-** An application under sub-section (6) of section 391 for stay of the commencement or continuation of any suit or proceeding against the company may be moved by a Judge's summons *ex parte*, provided that where a petition for winding-up the company or a petition under section 397 or 398 is pending, notice of the application shall be given to the petitioner in such petition."

23. It is admitted that petitions for the winding-up of the Company were filed by some of the

Applicants which had not been finally disposed of when Company Application NO. 339 of 2004 was filed. These petitions were filed prior to Company Application No. 339 of 2004. For instance the Applicant in Company Application (L) NO. 827 of 2004 had filed Company Petition no. 768 of 2003 on 3rd March, 2003.

24. Mr. Dwarkadas however submitted that these Company Petitions cannot be said to have been "pending" within the meaning of that expression in Rule 71 on the date on which Company Applications no. 339 of 2004 was taken out and on the date on which the order dated 27th August 2004 was passed. He based this submission on the fact that an Appeal was pending before the Appellate Authority AAIFR under the (Special Provisions) Act, 1985 and in view of Section 22(1) thereof which reads as under :-

> **22. Suspension of legal proceedings, contracts etc.-** (1) Where in respect of an industrial company, an inquiry under section 16 is pending or any scheme referred to under section 17 is under preparation or consideration or a sanctioned scheme is under implementation or where an appeal under section 25 relating to an industrial company is pending, then, notwithstanding anything contained in the Companies Act, 1956 (1 of 1956) or any other law or the memorandum and articles of association of the industrial company or any other instrument having effect under the said

> Act or other law, no proceedings for the winding up of the industrial company or for execution, distress or the like against any of the properties of the industrial company or for the appointment of a receiver in respect thereof and no suit for the recovery of money or for the enforcement of any security against the industrial company or of any guarantee in respect of any loans or advance granted to the industrial company shall lie or be proceeded with further, except with the consent of the Board or, as the case may be, the Appellate Authority."

25. It is true that the said Company Petitions for winding-up cannot be proceeded with further in view of the Appeal before the AAIFR except with the consent of the Appellate Authority. However that would not justify the contention that the Company Petitions were not pending in this Court within the meaning of that expression in Rule 71. Because the petitions cannot be temporarily proceeded with it does not follow that they are not pending in this Court. Mr.Dwarkadas relied upon the definition of the term "pending" in Black's Law dictionary and Stroud's Judicial Dictionary, Edn.3, Vol.3, p.2141 which read as under:-

> Black's Law dictionary, 8th Edition:
>
> **"Pending**, adj. **1.** Remaining undecided ; awaiting decision <a pending case>. **2.** Parliamentary law. (Of a motion) under consideration : moved by a member and stated by the chair as a

question for the meeting's consideration. See CONSIDERATION (2) ; ON THE FLOOR. A motion may be immediately pending, meaning that it is directly under consideration, being the last motion stated by the chair and next in line for a vote ; or it may be pending subject to other motions of higher rank that have taken precedence over it. See *immediately pending motion pending motion* under MOTION (2).

pending, prep. **1.** Throughout the continuance of ; during <in escrow pending arbitration>. **2.** While awaiting ; until <the injunction was in force pending trial>."

Stroud's Judicial Dictionary, Edn.3, Vol.3, p.2141 :

"Pending :- (1) A legal proceeding is "pending" as soon as commenced and until it is concluded, i.e.,so long as the Court having original cognizance of it can make an order on the matters in issue, or to be dealt with, therein. Similar are the observations of Jassel, M.R. In re Clagett's Estate; Fordham v. Clagett, (1882) 20 Ch.D.637 at p.653 (J).

"What is the meaning of the word "pending" ? In my opinion, it includes every insolvency in which any proceedings can by any possibility be taken. That I think is the meaning of the word "pending".... A clause is said to be pending in a Court of justice when any proceeding can be taken in it. That is the test." "

26. The definition in Stroud's Judicial Dictionary was cited with approval by the Supreme

Court in *Asgarali Nasarali Singaporewalla v. State of Bombay, A.I.R. 1957 S.C. 503.*

27. The definitions are of no assistance to Mr.Dwarkadas. Nor is the judgment of the Supreme Court of any assistance to him. In fact the judgment of the Supreme Court is against the proposition canvassed by Mr.Dwarkadas.

28. In *Asgarali Nasarali Singaporewalla v. State of Bombay, A.I.R. 1957 S.C. 503*, the Appellant was accused No.3 before the Court of the learned Presidency Magistrate. Accused No.1 was the mehta, in the employment of the firm of which Accused No.2 was the Manager. Accused Nos.4 and 5 were receivers of the firm. The Accused were charged with offences under Section 161 read with Section 116 and further read either with Section 109 or 114 of the I.P.C. for offering a sub inspector of police a bribe. The trial commenced on 14th July, 1951. During the course of the trial, the Criminal Law Amendment Act, 1952 was enacted by Parliament on 28th July, 1952 being an act further to amend the I.P.C. and the Cr.P.C. On 23rd September, 1952, the Government of Bombay appointed a Special Judge to try inter-alia the aforesaid offences and this appointment was notified in the Official

Gazette on 26th September, 1952. Section 10 of that Act provided that all cases triable by the Special Judge under Section 7 which immediately before commencement of the Act were pending before any Magistrate shall on such commencement be forwarded for trial to the Special Judge having jurisdiction over such cases.

. The defence concluded its address on 26th September, 1952 and the learned Presidency Magistrate delivered his judgment on 29th September, 1952 whereby he convicted Accused Nos.1 and 2 of the offences with which they were charged and acquitted the Appellant and Accused Nos.4 and 5 of the offences. This Court in the criminal appeal held that the provisions of the impugned Act was intra-vires and the Presidency Magistrate had no jurisdiction to try the case after the commencement thereof. This Court accordingly set-aside the order of acquittal of the Appellant and Accused Nos.4 and 5 and ordered a re-trial. For the present purpose, it is important to note, as held by the Supreme Court that the learned Presidency Magistrate was divested of jurisdiction to try the said case in view of the provisions of Section 7 thereof.

29. It is in this context that the Supreme Court considered the meaning of the expression "pending" in Section 10 of the impugned Act. The Supreme Court came to the conclusion that on the date of commencement of the Act, the said case was pending before the learned Presidency Magistrate and that he was therefore divested of jurisdiction to try it.

30. It is important to note therefore that even in a case where there was an absolute ouster of jurisdiction in a Court to try a case filed before it, it was held that the case was nevertheless deemed to be pending before it. On the impugned Act coming into force the Presidency Magistrate had no interest jurisdiction to try the case. On a parity of reasoning, it must be held that though the winding-up petitions cannot be proceeded with further they are nevertheless pending before this Court.

31. The winding-up Petitions have not been disposed of. The definitions in Black’s Law Dictionary and Stroud’s Judicial Dictionary in fact indicate that a legal proceeding is pending as soon as it is commenced and until it is concluded.

32. Moreover the ambit of the expression

"pending" in Rule 71 ought to be given a liberal interpretation even assuming that another view is possible. Any order or application under section 391 (6) would adversely affect the rights of the Petitioner who have filed Petitions for winding up of the company. That is too obvious to require any elaboration. It is also obvious from the provisions of and recognized in Rule 71 itself. Further the service on a petitioning creditor with an application under Section 391(6) can never prejudice the interests of the company for all that it would entail in is such petitioning creditors being heard before an order under Section 391 (6) is passed.

33. In the circumstances, it must be held that even if a winding up petition is stayed for any reason, so long as it is not finally disposed of, a company is bound to give notice to the Petitioner of such Petition of an application it proposes to make under Section 391 (6).

RE : SUBMISSIONS IV & V

34. Considering the view that I have taken above, it is not necessary to decide these submissions.

ORDER

35. In the circumstances, Company Application No.339 of 2004 is dismissed. Company Application (L) No.827 of 2004, Company Application (L) No.462 of 2004, Company Application (L) No.880 of 2004 and Company Application (L) No.942 of 2004 all in Company Application No.338 of 2004 are made absolute in terms of prayer clause (a). The order dated 27th August, 2004 shall operate till 17th January, 2005 to enable the Company to carry the matters higher. There shall be no order as to costs.

. All the concerned parties to act on an ordinary copy of this order duly authenticated by the Company Registrar/Court Stenographer of this Court.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

COMPANY APPLICATION NO. 339 OF 2004
IN
COMPANY APPLICATION NO.338 OF 2004

WITH

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WITH

COMPANY APPLICATION (LDG.) NO.942 OF 2004
IN
COMPANY APPLICATION NO.338 OF 2004

DATE OF DECISION : 4TH/5TH NOVEMBER, 2004.

For Approval and Signature :

HON'BLE MR.JUSTICE S.J. VAZIFDAR.

1. Whether Reporters of Local Papers)
may be allowed to see the judgement ?)

2. To be referred to be Reporter or not ?)